

No. 1-14-0568

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

U.S. BANK, N.A., as Trustee Under)	Appeal from the Circuit Court
Pooling and Servicing Agreement dated as of)	of Cook County.
August 1, 2006, Master Asset-Backed)	
Securities Trust 2006-HE3 Mortgage)	
Pass-Through Certificates, Series 2006-HE3,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 12-CH-39392
)	
VIRGINIA QUINONES, a/k/a Virginia L.)	
Quinones, and AUGUSTIN QUINONES,)	
a/k/a Augustine Quinones,)	Honorable
)	Alfred Swanson,
Defendants-Appellants.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* The judgment of the circuit court granting the plaintiff's voluntary dismissal motion without prejudice was affirmed.
- ¶ 2 On October 25, 2012, the plaintiff, U.S. Bank, N.A., as Trustee Under Pooling and Servicing Agreement dated as of August 1, 2006, Master Asset-Backed Securities Trust 2006-

HE3 Mortgage Pass-Through Certificates, Series 2006-HE3 (hereinafter "U.S. Bank"), filed a complaint to foreclose the mortgage on the Chicago residence of the defendants, Virginia Quinones, a/k/a Virginia L. Quinones, and Augustin Quinones, a/k/a Augustine Quinones.

¶ 3 On April 11, 2013, the defendants moved for a judgment on the pleadings, arguing that U.S. Bank admitted the facts which supported their affirmative defenses that it failed to provide them with the requisite grace period or with notice of the alleged loan default before commencing the foreclosure action. On May 1, 2013, U.S. Bank moved to voluntarily dismiss its complaint without prejudice pursuant to section 2-1009 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1009 (West 2012)) to which the defendants did not file a response. On August 13, 2013, the court continued both pending motions to August 20 at the request of defense counsel.

¶ 4 On August 20, 2013, the circuit court granted U.S. Bank's motion to voluntarily dismiss its action and denied the defendants' motion for a judgment on the pleadings. On September 13, 2013, the defendants moved for reconsideration, arguing in relevant part, that U.S. Bank's motion to voluntarily dismiss its action should have been denied because it failed to give them proper notice of the motion under the Cook County Local Rules. In their prayer for relief, the defendants alternatively requested that the court "modify the dismissal so that it is entered with prejudice." In the motion, the defendants did not raise any argument related to section 13-217 of the Code ((735 ILCS 5/13-217 (West 1994))). On February 4, 2014, the circuit court denied the defendants' motion for reconsideration.

¶ 5 On March 4, 2014, the defendants filed their notice of appeal. On June 30, 2014, U.S. Bank moved this court to dismiss the defendants' appeal for lack of jurisdiction. In a July 16, 2014, order, this court found that: (1) we lack jurisdiction to consider the order denying the

defendants' motion for a judgment on the pleadings; and (2), relying on *Dillie v. Bisby*, 106 Ill. 2d 487 (1985), we have jurisdiction to consider the defendants' appeal of the voluntary dismissal order, but the scope of review is limited to the issue of whether the voluntary dismissal should have been granted with or without prejudice.

¶ 6 The parties thereafter submitted briefs on this narrow issue—whether the circuit court erred when it granted U.S. Bank's voluntary dismissal, without prejudice, under section 2-1009 of the Code. Because the question presented requires us to interpret section 2-1009, we apply *de novo* review. *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 6 (2009) (stating statutory interpretation questions are questions of law to be reviewed *de novo*).

¶ 7 At the outset, the defendants ask us to take judicial notice of several documents in their appendix, which are not contained in the appellate record, including: U.S. Bank's 2010 foreclosure complaint; U.S. Bank's federal foreclosure complaint; and the federal court docket history which states that the case was stayed pending resolution of this appeal. According to the defendants, these documents establish that, on May 4, 2012, U.S. Bank voluntarily dismissed its initial foreclosure action instituted against them on the Chicago property and, pursuant to its right under section 13-217 of the Code, it refiled the action on October 25, 2012. Additionally, a few months later, U.S. Bank filed a third foreclosure action against the defendants in federal court. Although we may take judicial notice of these court documents (see *Muller v. Zollar*, 267 Ill. App. 3d 339, 341 (1994)), we do not find them helpful in resolving the particularly narrow issue presented in this appeal.

¶ 8 "Pursuant to section 2-1009, three requirements must be met in order for a plaintiff to voluntarily dismiss her case without prejudice as of right: 1) the plaintiff must move for the voluntary dismissal prior to the beginning of trial or hearing; 2) the plaintiff must give proper

notice; and 3) the plaintiff must pay costs." *Valdovinos v. Luna-Manalac Med. Ctr., Ltd.*, 328 Ill. App. 3d 255, 267 (2002) (citing 735 ILCS 5/2-1009 (West 1996)). When a party complies with the requirements of section 2-1009, his or her right to a "dismissal without prejudice is, with very limited exceptions, unfettered." *Id.* at 265. The limited exceptions include: (1) where a pending defense motion could result in a final disposition of the cause of action if ruled upon favorably by the court; and (2) where the circumstances of the case are such that a voluntary dismissal would directly conflict with a supreme court rule. *Morrison v. Wagner*, 191 Ill. 2d 162, 165 (2000). In the former scenario, the circuit court has discretion to hear and decide the pending defense motion before ruling on the plaintiff's motion for voluntary dismissal. *Id.* In the latter scenario, the "terms of the [supreme court] rule take precedence." *Id.*

¶ 9 In this case, the defendants have raised no issue suggesting that a supreme court rule conflicts with section 2-1009 of the Code. While the defendants argued that U.S. Bank failed to provide them with the requisite grace period or with notice of their alleged default in a motion for a judgment on the pleadings, they do not contend that the circuit court failed to rule upon their motion for a judgment on the pleadings prior to ruling upon U.S. Bank's motion for voluntary dismissal.¹ Further, on appeal, the defendants do not dispute the facts that U.S. Bank: moved for the voluntary dismissal prior to the beginning of trial or hearing; gave proper notice of

¹ There is no report of proceeding from the hearing on the parties' motions indicating the order in which the motions were ruled upon. It is the appellant's burden to present a sufficiently complete record of the proceedings at trial to support a claim of error. *Muellman-Cohen v. Brak*, 361 Ill. App. 3d 52, 53-4 (2005) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984)). In the absence of such a record on appeal, it is presumed that the order entered by the circuit court conformed to the law and had a sufficient factual basis, and any doubts arising from the incompleteness of the record are resolved against the appellant. *Id.*

its motion²; and paid costs. Therefore, U.S. Bank had the unfettered right to voluntarily dismiss its action without prejudice.

¶ 10 While the defendants contend that the voluntary dismissal order should have been entered with prejudice because U.S. Bank would have no right to refile its action pursuant to the single refiling limitation imposed by our courts' interpretation of section 13-217 of the Code (see 735 ILCS 5/13-217 (West 1994); *Schrager v. Grossman*, 321 Ill. App. 3d 750, 754 (2000)), this issue was not raised in the circuit court and is therefore forfeited.

¶ 11 "Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal." *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15. Here, the only reference to the defendants' request for a "with prejudice" dismissal is found in the conclusory prayer for relief paragraph of their motion for reconsideration. The defendants filed no response to U.S. Bank's motion for voluntary dismissal and did not otherwise raise their section 13-217 argument in any other motion contained in the record. The record on appeal also is devoid of any reports of proceedings from hearings that occurred in the circuit court which may establish that the circuit court was presented with the defendants' section 13-217 argument. See *Muellman-Cohen*, 361 Ill. App. 3d at 53-4. That being said, we make no comment as to whether an attempt by U.S. Bank to file a third action may be defeated by a motion to dismiss, with prejudice, based on the single refiling limitation of section 13-217 of the Code. See *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 254 (1991) (finding that the circuit court should

² Although the defendants argued in their motion for reconsideration that U.S. Bank did not comply with the Cook County Local Rules regarding notice of motions, they do not raise the issue in their appeal, and it is therefore forfeited. See Ill. S.Ct. R. 341(h) (eff. Feb. 6, 2013); *Bigelow v. City of Rolling Meadows*, 372 Ill.App.3d 60, 64 (2007).

have granted the defendant's motion to dismiss with prejudice on section 13-217 grounds where the plaintiff's first complaint was dismissed for lack of jurisdiction and its second complaint was voluntarily dismissed without prejudice).

¶ 12 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 13 Affirmed.